NO. 83-98

SUPREME COURT OF THE UNITED STATES

TERM:

EFFIE R. HUMPHREY

V.

CITY OF SHREVEPORT, DON GRAHAM,

R.C. FEAZEL AND JACKIE KELLY FEAZEL

ON WRIT OF CERTIORARI TO THE UNITED STATES

COURT OF APPEAL, 5TH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the written material presented by the plaintiff-petitioner, Effie Humphrey, in opposition to defendants' Motion for Summary Judgment should have been considered by the lower courts as an affidavit despite lack of formal requirements of Rule 56(e) of the Federal Rules of Civil Procedure, where there was no objection offered by the defendants.

2. Assuming that the material offered by the plaintiff could have been considered as a formal affidavit, did the allegations made by the plaintiff show a genuine issue of material fact so as to preclude the granting of the Motion for Summary Judgment.

3. Whether the plaintiff has made the necessary allegations in her original petition against the defendants R.C. and Jackie Feazel to present a federal cause of action against those defendants?

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TABLE OF AUTHORITIES

1. U.S. for Use of & Benefit of Austin v. Western Electric Co., C.A. Cal.,1964, 337 F.2d 568.
2. Noblett v. General Electric Credit Corp., C.A. Okl. 1968, 400 F.2d 442, cert. denied 89 S.Ct. 295, 393 U.S. 935, 21 L.Ed. 2d 271.
3. McPhee v. Oliver Tyronne Corp., C.A., La., 1974, 489 F.2d 718.

REFERENCE TO UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN COURTS BELOW

1. Memorandum Ruling by Judge Tom Stagg, District Judge, United States District Court for the Western District of Louisiana, Shreveport Division; Civil Action No. 80-0241; Dated July 9, 1982.

2. Per Curiam opinion by the United States Court of Appeal, 5TH Circuit; No. 82-3507, Summary Calendar; Dated April 21, 1983.

JURISDICTIONAL GROUNDS

The Jurisdictional Grounds of this Petition for Writ of Certiorari are under 28 USC 1254 (1). See above for dates of judgments sought to be reviewed.

STATUTES

1. Rule 56 of the Federal Rules of Civil Procedure. See Appendix.

STATEMENT OF THE CASE

Plaintiff, Effie R. Humphrey, filed suit in federal District Court in Shreveport, Louisiana, in February, 1980, against the City of Shreveport, Don Graham (a city employee), alleging that the City of Shreveport had unconstitutionally deprived her of city water service; also named as defendants were R.C. Feazel and Jackie Feazel, who were alleged to have conspired with the City of Shreveport and Don Graham in the denial of water service and, as well, to have committed acts of slander, libel and other harrassment of the plaintiff in a conspiracy with City employees.

The defendants filed a Motion for Summary Judgment after having earlier filed affidavits purporting to set out facts supporting their position. Although the plaintiff's attorney who was representing her at that time did not file opposing

affidavits, the plaintiff did herself file an extensive memorandum of her own with supporting documents, which specifically and in great detail controvened each allegation made in the defendants' affidavits.

Although the plaintiff's memorandum was not verified as required by Rule 56 of the Federal Rules of Civil Procedure, the defendants had ample notice to object to the form of the memorandum but failed to do so.

The District Court then, on July 9, 1982, upheld defendants' Motion for Summary Judgment, in part, on the grounds that the plaintiff had failed to adequately respond to the Motion for Summary Judgment with specific evidence showing a material factual dispute. As to the issue of plaintiff's claim against the Feazels the District Court ruled that the federal law of res judicata perempted that claim because

of a prior Louisiana state court ruling.

On appeal, the 5th Circuit Court of Appeals upheld the District Court on the issue of a material factual dispute as to the claim against the City of Shreveport; the Court also held that the claim against the Feazels would be dismissed, not on the grounds of res judicata, overuling the District Court, but on the grounds that the plaintiff had failed to allege a conspiracy of the Feazels with a state official, thus not showing a federal cause of action.

Plaintiff now brings the petition for writ of certiorari to the Supreme Court of the United States to review the findings of the lower courts.

Plaintiff submits that both lower courts erred in finding that the plaintiff had not met the defendants' Motion for Summary Judgment with sufficient evidence of proper form so as to present a material factual dispute.

The City of Shreveport argued in its affidavits that the denial of water service was based on (1) plaintiff's refusal to pay a water bill, and (2) plaintiff's failure to resubdivide her property in order to obtain water service to two structures located on her property, with the City claiming that the resubdivision was merely a formality.

In her memorandum filed in the record, the plaintiff went into great detail, and although the style may have been rambling and overly long, it cannot honestly or with any sense of fair play be denied that every allegation of the defendants was met squarely by the plaintiff. With no reasoning given, both lower courts decided that it would be more expeditious and easier merely to discard without consideration the plaintiff's memorandum and then to accept as uncontroverted fact the allegations of defendants affidavits. The plain-

tiff showed clearly that 15 year dispute with the City for water service was not merely the result of non payment of a water bill, and that the resubdivision was not merely a formality but a requirement to actually move the structures on her property, which requirement had not been forced on her neighbors.

The failure of the lower courts even to take cursory notice of the plaintiff's memorandum constitutes a gross and cavalier disregard of plaintiff's right to have her case decided openly and fairly in a trial proceeding. The defendants would have preferred nothing more than to have escaped from an open trial in which they would have had to somehow have justified their discriminatory and illegal conduct toward the plaintiff.

Several allegations amounting to outright lies were made in the defendants' affidavits.

One affidavit by a Jerry Taylor makes the bald and unsupported claim that the plaintiff had pulled a gun on a city employee. This is vehemently denied by the plaintiff; yet the lower courts decided to believe the defendants' affidavit, with no reasoning given, over the plaintiff's statement. Is this what is meant by the "right" to a fair trial in our society? For reasons not known to the plaintiff the lower courts never considered any of the allegations of her own statement, and she will not now have the opportunity to come before an independent tribunal to prove her case and to expose the mendacity and slander of the city employees. This amounts to nothing more than a trial by affidavit, and the decisions of the lower courts should be overturned, allowing the plaintiff to exercise her right to bring her grievances before a court and to obtain justice.

As to the issue of the claim against the defendants, the Feazels, the 5th Circuit correctly overuled the District Court as to its holding on res judicata, but then went on to hold that the plaintiff had failed to allege any "joint" action by the Feazels with a state official so as to raise a federal cause of action. Not only has the 5th Circuit decided to close its eyes to and dismiss without consideration plaintiff's evidence in opposition to the defendants' Motion for Summary Judgment, but now the Court, in order to insure no possible cause of action for the plaintiff, has, in effect, amended the plaintiff's own petition. Plaintiff's petition clearly alleges that the defendants Feazels had conspired one with another and the City of Shreveport to cause the denial of her water service. All one has to do is read the petition to discern this. Indeed, this very issue was raised by the

defendants in an earlier filed Motion to Dismiss, which was specifically overuled by the District Court.

Therefore, plaintiff strongly requests that she be given her only available remedy against the wrongs perpetrated against her, i.e., simply, a trial. She has no means of her own, other than the judicial system, to fight for her rights. If it turns out that she is wrong, then so be it. However, to deny the plaintiff her day in court is to force upon her perhaps the gravest injustice that can be visited upon a citizen of this country.

The original basis for federal jurisdiction in the court of first instance was 42 USC 1983 & 1984, and 28 USC 1343.

ARGUMENT

In response to the defendants' Motion For Summary Judgment, the plaintiff (on her own and without the assistance of counsel) filed a lengthy memorandum along with supporting documents setting forth her position in opposition to the Motion for Summary Judgment.

Both lower courts held that the plaintiff's memorandum was not sufficient to raise the presence of a material factual dispute. Part of the reasoning of the courts was that the memorandum filed was not a sworn affidavit. It is well settled in the federal jurisprudence that unsworn documents may be admitted into evidence and may be used to oppose a Motion for Summary Judgment if no objection is made by an opposing party. U.S. for Use & Benefit of Austin v. Western Electric Co., C.A. Cal. 1964, 337 F.2d 568; Noblett v. General Electric Credit Corp., C.A. Okl. 1968, 400 F.2d 442,

cert. denied, 89 S.Ct. 295, 393 U.S. 935, 21 L.Ed2d 271.

No objection was made to the plaintiff's memorandum, and, therefore, the defendants waived any right to claim a defect in the formality of the memorandum.

Summary judgment should be granted only when the moving party is entitled to judgment as a matter of law and no genuine issue remains for trial, it being quite clear what the truth is, McPhee v. Oliver Tyronne Corp., C.A. La., 489 F.2d 718. In the present case, the defendants offered in their affidavits nothing more than bare allegations as to what their position was on the issue of the city's refusal to provide water. In response the plaintiff controverted every allegation and explained in detail her own position. There was simply nothing before either lower court which could possibly form a basis for deciding which set of affidavits and memorandum

was true.

The cases in the federal jurisprudence are almost too numerous to cite which hold that the summary judgment is an extreme remedy and should not be granted unless it is clear beyond controversy that the moving party is entitled to judgment as a matter of law and that the summary judgment should not be used as a substitute for trial.

Plaintiff submits that clearly in this case there is a substantial question as to whether the City of Shreveport was justified in denying water service to the plaintiff for over 15 years. Further, it is clear that the lower courts decided the issue only on the basis of defendants' affidavits with only a cursory reading of and almost a contemptible disregard for the facts presented by the plaintiff.

In dismissing plaintiff's own memorandum as not worthy of consideration, both lower courts ignored Mrs. Humphrey's

contention as to the illegality of the City's zoning regulation, (Page 91 and 94 of the Trial Transcript); ignored Mrs. Humphrey's evidence concerning the annexation of her property into the City and the resulting effect of the zoning regulation on her (Page 188 of the Trial Transcript); ignored Mrs. Humphrey's contention that the City's requirement of resubdivision of her property was burdensome and illegal (Page 204 of the Trial Transcript); ignored Mrs. Humphrey's contention and evidence that her neighbors were not required to undergo the same resubdivision as she was required to do (Page 189 and 202 of the Trial Transcript).

The lower courts may in their own wisdom believe that Mrs. Humphrey's complaints are not justified. However, forcing that opinion on the plaintiff and denying her a fair trial is not their prerogative. If there is the existence of any

doubt as to the truth of the issues raised in the trial, then both courts should have overuled the Motion for Summary Judgment. Only by completely ignoring and pretending that the plaintiff filed nothing in response to the Motion could the courts have reached the decisions they did.

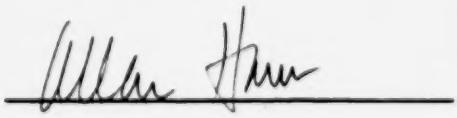
As to the remaining issue of whether the plaintiff alleged a conspiracy by the Feazels with state officials to deprive her of water service and other constitutional rights, plaintiff would simply refer to her petition which in fact does make the explicit and clear allegations of a conspiracy, and would adopt the District Court's reasoning when it in fact overuled defendants' earlier Motion to Dismiss on those very grounds.

CERTIFICATE OF SERVICE

This is to certify that service of this pleading has been made by depositing such in the United States mail, postage prepaid to: J.W. Jones, 705 Lane Bldg., Shreveport, La. 71101, and Ed Greer, PO Box 404 Shreveport, La. 71162, in accordance with Rule 28.3 of the Rules of the Supreme Court.

APPEARANCE OF COUNSEL

Counsel for petitioner, Effie R. Humphrey, hereby formally makes appearance of counsel in this Petition for Writ of Certiorari.



APPENDIX

RULE 56

OF THE FEDERAL RULES

OF CIVIL PROCEDURE

(Pertinent Part)

Rule 56 (e):

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all copies papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his

pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 82-3507

Summary Calendar

EFFIE R. HUMPHREY,

Plaintiff-Appellant,

versus

CITY OF SHREVEPORT, DON GRAHAM, R.C. FEAZEL AND JACKIE KELLY FEAZEL,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

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(April 21, 1983)

Before REAVLEY, GARWOOD and JOLLY, Circuit Judges.

PER CURIAM:

Plaintiff Humphrey filed suit in fed-

eral court under 42 U.S.C. 1983, 1985 and the fourteenth amendment against the City of Shreveport, the City Zoning Inspector, Don Graham, and plaintiff's neighbors, the R. C. Feazels, for discrimination based on the plaintiff's "age, sex, marital status, and position in the community," and for an unspecified conspiracy between the city and the neighbors. Summary judgment was granted for the defendants. Because we find that the plaintiff has controverted no material fact and that the defendants are entitled to judgment as a matter of law, we affirm.

I.

This appeal follows a lengthy trail of litigation between plaintiff Humphrey and her neighbors, the defendants Feazel, and encompasses her various disputes with the City of Shreveport. Litigation began as early as 1973 in the Louisiana state court. The dispute is now continuing its

journey in the federal system in this appeal from a grant of summary judgment.

Plaintiff Humphrey has owned real property in Caddo Parish, Louisiana, since 1946. In August 1966 her property was annexed into the city limits of Shreveport. After annexation, Mrs. Humphrey applied for city water to her frame house and to a trailer located on her property in front of the house. She was given water to the trailer, but in order to have water to both structures, she was informed that she would have to have her property subdivided, a relatively simple bookkeeping process which required only her signature on certain papers furnished by the city. This she has failed to do.

While some haggling in years past serves as a hazy and vaguely related backdrop to our immediate setting, it was in 1973 that Mrs. Humphrey began complaining that she was getting bad water. She sub-

sequently stopped paying for it. They city commissioner at the time arranged to have her bills paid by her nephew, thus eliminating the necessity of sending bills to Mrs. Humphrey. Upon discovering this, however, Mrs. Humphrey became irritated and stated that no one would pay her water bills because the water was poisoned. The city's subsequent analysis of the physical and chemical contents of the water determined that Mrs. Humphrey's water compiled with both state and federal safe drinking water regulations. The water was then turned off, and after numerous meetings and telephone conversations between Mrs. Humphrey and various city employees, Mrs. Humphrey was notified on at least three occasions by city employees that if she would retire her delinquent water bill of $13.95 and pay the required $20 deposit, water would be immediately restored to her trailer. Each notification letter included

a deposit form that could be returned by mail, thus eliminating further trips to city hall. Neither the delinquent bill nor the deposit has been paid.

Defendant Don Graham, a city zoning inspector, entered the picture as early as 1967, when the city's building inspector notified him that the house trailer had been moved onto the front of Mrs. Humphrey's lot. Graham visited the property, found that the arrangement violated the city's zoning ordinance which prohibited more than one living-unit on a single lot, and left a "Notice of Zoning Violation" sign on the trailer. On a subsequent visit, Graham photographed the property and attempted to alert Mrs. Humphrey to the zoning ordinance requirements.

In October 1968, Graham was asked again to photograph the premises after the city received information that Mrs. Humphrey was installing a series of water outlets

in order to begin a trailer park on her property, another violation of the zoning ordinance. Graham returned to the property, found the reported conditions, and photographed the area.

The Feazel defendants have been Mrs. Humphrey's neighbors for thirty-one years. In 1965 the Feazels allowed Mrs. Humphrey to tie onto their water well until the city water system was extended to their neighborhood. Their involvement in the subject matter of the instant case, however, apparently began in 1976 when R. C. Feazel called the Shreveport Police Department after being advised that Mrs. Humphrey had threatened the lives of his three grandchildren. The Feazels subsequently signed an affidavit and presented their own and several other neighbors' petitions to the Caddo Parish Coroner to have Mrs. Humphrey examined for treatment. The petitions enumerated several examples of Mrs. Humphrey's

"bizarre behavior." Mrs. Humphrey was committed by the county coroner to the Confederate Memorial Hospital for examination. She was discharged six days later on the conditions that she surrender her pistol and shotgun and that she submit to regular follow-up treatment at the Shreveport Mental Health Clinic. See Humphrey v. Feazel, 367 So.2d 897, 898 (La.App. 1979).

Mrs. Humphrey subsequently filed suit in state court against the Feazels and all others who had signed the petitions, alleging false imprisonment and libel arising out of her commitment by the coroner. Humphrey, 367 So.2d at 897-98. Both the trial and appellate courts found that these state court defendants had acted in good faith and were not subject to liability under Louisiana law. Humphrey, 367 So.2d at 898. According to the appellate court, the evidence established that the statements contained in the petition were sub-

stantially true, and that the evidence of plaintiff's history of "bizarre and threatening behavior" established that the state court defendants had acted in good faith and without malice in instituting the commitment process. Id.

Against this background Mrs. Humphrey filed suit against the defendants in federal court in February 1980 under 42 U.S.C. 1983, 1985 and the fourteenth amendment, seeking injunctive relief and $1,025,000 in damages. The complaint alleged that the defendants had denied Mrs. Humphrey right to "adequate living accommodations, including the right to repair her home, the right to city water, and the right to equal protection of the law . . ." because of her age--old, sex--female, marital status--widow, and position in the community--unspecified.

According to the complaint, the city deprived Mrs. Humphrey of her constitu-

tional rights by allowing other residents with two structures on their residential lots to have water to both structures while denying her the same right. Furthermore, Mrs. Humphrey claimed that the city had denied her water because it wrongfully claimed that her trailer violated city zoning ordinances and that she planned to put in a mobile home park. Graham allegedly instigated this wrongful denial by the reports and pictures which wrongly indicated that Humphrey was violating city zoning ordinances. Jackie Feazel, according to the complaint, is the person who unjustly notified the city that Mrs. Humphrey was planning a trailer park. This apparently forms one part of the "conspiracy with the city" claim. The Feazel's major part in the "conspiracy" to deprive plaintiff of her constitutional rights, however, stems from years of harassment focused specifically on the events of 1976 for which Mrs.

Humphrey sued the Feazels in state court. According to the allegations, these false reports and Mrs. Humphrey's subsequent confinement in a mental ward led to her being branded as a "nut", and as a result the city failed to take her claims or complaints seriously.

The defendants filed a Motion to Dismiss on April 25, 1980, which was denied as to all but one claim.[1] The defendants' subse-

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[1]Mrs. Humphrey claimed that the City of Shreveport had unconstitutionally denied her the right to adequate housing by failing to remove her trailer a reasonable distance from a road which the city had widened after "expropriating Petitioner's property." The source of this affirmative duty was a city zoning ordinace which required a minimum front-yard set-back of thirty feet. (The trailer was twenty-eight feet from the newly widened road.) Noting that "the Constitution does not require that zoning enforcement powers granted to municipalities be excercised in a mandatory rather than a discretionary manner" (citations omitted), the court found that since the City of Shreveport had no duty to move the trailer, the plaintiff could show no set of facts which would entitle her to relief. The (cont'd.)

quent Motion for Summary Judgment was granted. From that grant, Mrs. Humphrey timely appeals.

II.

The question before us is whether there were sufficient facts properly before the trial court to preclude a grant of summary judgment on the plaintiff's 1983 and 1985 claims. In addition to arguing that there was a material dispute of facts, the plaintiff also contends that the district court's prior denial of the defendants' Motion to Dismiss precludes a later grant of summary judgment on the same issues, and that the trial court erred by applying federal, rather than Louisiana principles of res judicata.

The essence of the 1983 claim is

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court thus dismissed that part of the complaint subject to the plaintiff's right to file an amended complaint and to set out a valid federal cause of action.

that the city denied her equal protection in affording other residents services which she was precluded from getting; that is, that she was required to subdivide her property before receiving water for both structures on her property while others were allowed to receive water at two dwellings on their property without meeting that requirement. The 1985 claim is that the Feazels and the city defendants conspired to deny her access to water.

A.

Mrs. Humphrey's complaint does not identify which of the various allegations are grounded in 42 U.S.C. 1983 and which are grounded in 42 U.S.C. 1985. The complaint merely alleges that the city has denied her equal access to water, that Don Graham participated in this denial, and that the Feazels' participation in having her committed caused her to be branded a "nut" so that the city failed to take her com-

plaints seriously.

To state a successful claim under either 42 U.S.C. 1983 or the fourteenth amendment requires that the conduct complained of be committed by a person acting under color of state law and that the conduct deprived the plaintiff or rights, privileges, or immunities secured by the Constitution or laws of the United States. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150, 169, 90 S.Ct. 1598, 1604, 1614-15 (1970); Shelley v. Kraemer, 334 U.S. 1, 13, 68 S.Ct. 836, 842 (1948); Staton v. Wainwright, 665 F.2d 686, 687 (5th Cir. 1982); Herwald v. Schweiker, 658 F.2d 359, 362 n.5 (5th Cir. 1981). The allegations against the city and against Don Graham could appropriately be considered under 1983 since, if true, the requisite state action is present.

The allegations against the Feazels who are private citizens, however, would

be inappropriate unless there is some showing that the private individuals jointly engaged with state officials in the prohibited action. Adickes, 398 U.S. at 152, 90 S.Ct. at 1605-06. Even assuming arguendo that the nexus existed, in regard to the "being branded a 'nut'" claim, we would note that 1983 does not provide a cause of action for mere damage to reputation. Paul v. Davis, 424 U.S. 693, 712, 96 S.Ct. 1155, 1166 (1976); Bradford v. Bronner, 665 F.2d 680, 682 (5th Cir. 1982).

Moreover, the Feazels' participation in having Mrs. Humphrey committed does not constitute the necessary state action under 1983. Mrs. Humphrey has not alleged that the Feazels jointly engaged in any prohibited conduct with the parish coroner, the "state actor" in that scenario. And mere reliance by a "state actor" upon information provided by citizens who witness certain events does not convert the private

informants into state actors for purposes of 1983's state action requirement. Hernandez v. Schwegmann Brothers Giant Supermarkets, 673 F.2d 771, 772 (5th Cir. 1982). Thus the fact that the parish coroner relied on information provided by the Feazels does not make the Feazels independent "state actors" for purposes of 1983.

On the other hand, 42 U.S.C. 1985 does not require state action and this section will reach purely private conspiracies. To prevail under 42 U.S.C. 1985(3)[2], however, there must have been a conspiracy for the purpose of depriving a person or class of persons of the equal

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[2]Mrs. Humphrey's complaint does not identify which of 42 U.S.C. 1985's three subsections serves as the basis for her conspiracy claim. We must assume that her complaint relies on 1985(3) since the facts alleged have nothing to do with holding office (1985(1)) or with judicial proceedings (1985(2)).

protection of the laws, and there must have been an action in furtherance of that conspiracy by which the person or class was injured or deprived of exercising any right or privilege of a citizen of the United States. Griffin v. Breckenridge, 403 U.S. 88, 102-03, 91 S.Ct. 1790, 1798-99 (1971); Earnest v. Lowentritt, 690 F.2d 1198, 1202 (5th Cir. 1982). Moreover, the act in furtherance of the conspiracy must be independently illegal and the conspirators' actions must be motivated by class- or racially-based animus. Lowentritt, 690 F.2d at 1202; Scott v. Moore, 680 F.2d 979, 987 (5th Cir. 1982) (en banc); McLellan v. Mississippi Power & Light Co., 545 F.2d 919, 925 (5th Cir. 1977) (en banc).

B.

Summary judgment is appropriate only when there is no genuine issue of material fact and when the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P.

56(c). The burden is on the moving party to establish, by presenting particular evidence, that it is entitled to summary judgment as a matter of law. Once this is done, the burden shifts to the non-movant to show that summary judgment is not appropriate. Nicholas Acoustics v. H & M Construction Co., 695 F.2d 839, 844 (5th Cir. 1983). The party opposing the motion must meet the movant's affidavits with opposing affidavits or other competent evidence setting forth facts to show that there is a genuine issue of material fact for trial. White v. United Parcel Service, 692 F.2d 1, 3 (5th Cir. 1982). Mere general allegations which do not reveal detailed and precise facts are not a sufficient response. Nicholas Acoustics, 695 F.2d at 844.

It is against this background that we examine the record before us. The city defendant has presented sworn affidavits

and other competent evidence to show that Mrs. Humphrey no longer receives water to her trailer because of her failure to pay an overdue bill and to make a water deposit. The correspondence between the city officials and Mrs. Humphrey reveals a continuous, courteous, and conscientious effort to aid in the restoration of water service to the plaintiff in the easiest possible manner.

As for the service to both structural units on Mrs. Humphrey's lot, city officials explained on numerous occasions that service could be provided only if the property were subdivided and deposits were made for each structure. This procedure, as explained, was a relatively simple process. One city employee in particular had notified the proper officials of Mrs. Humphrey's predicament and had advised Mrs. Humphrey that all she had to do was to telephone the particular individual to have her problem rectified; another provided Mrs. Humphrey

with the necessary papers to complete the process. All that was required was her signature.

Affidavits presented by the three individual defendants evidence no actions which could be deemed either discriminatory or conspiratorial. The Feazels and Graham avowed that they had met only during Graham's visit to inspect the Feazel property in 1975 as a result of a complaint by Mrs. Humphrey. Each defendant denied any conspiracy, and the Feazels denied all of the other allegations lodged against them with the exception that they did sign a petition to have Mrs. Humphrey examined for treatment.

In opposing the motion, Mrs. Humphrey presented no substantial evidence. She has not stated how the defendant's refusal to provide her with water has deprived her of any federally protected right. The defendants have alleged that she has refused to

pay her water bills and have supported this allegation with affidavits. She has not countered this evidence. She has also failed to show how the Feazels have denied her access to the city water supply or how they have deprived her of any federally protected right. Mrs. Humphrey has only recited a long list of grievances concerning her long-standing dispute with defendants. In face of the defendants' evidence, Mrs. Humphrey's vague and conclusory allegations of discrimination and a conspiracy, none of which is under oath, do not constitute the competent evidence required to refute the defendants' affidavits. Thus, in the absence of any competent evidence supporting Mrs. Humphrey's claims of infringement of federally protected rights, summary judgment was appropriate.

C.

The only uncontested allegation is the Feazels' admitted participation in present-

ing a petition to the Caddo Parish Coroner, and Mrs. Humphrey's resultant commitment. Nowhere in this particular allegation, however, has Mrs. Humphrey asserted any illegal action by any city or parish official. The requisite state action is thus lacking for a 1983 claim, and, if cognizable at all, must come under the ambit of 42 U.S.C. 1985(3).

In asserting that the Feazels petitioned the coroner to have her committed, however, Mrs. Humphrey has in no way successfully identified a deprivation of federally protected rights or any class- or racially-based animus. Her sole contention in regard to this claim is that the Feazels' actions "led to petitioner being branded as a 'nut' which has resulted in none of the petitioner's complaints or claims to the city officials (being) taken seriously. Defendants knew, or should have known, that their acts would result in depriving

plaintiff of federally protected rights." In view of the warning of the Breckenridge Court that 42 U.S.C. 1985(3) was not meant to apply to all "tortious, conspiratorial interference with the rights of others," 403 U.S. 88, 101, 91 S.Ct. 1790, 1798 (1971), we find that these allegations against the Feazels must also fail. For that reason, summary judgment was also appropriate on this claim.

III.

With respect to Mrs. Humphrey's other contentions that the district court's earlier denial of the defendants' Motion to Dismiss precluded a later grant of summary judgment,[3] there is no basis in law

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[3]Mrs. Humphrey contends that because materials extraneous to the pleadings were submitted with the defendants' Motion to Dismiss, and since the district court did not exclude the materials, the Motion to Dismiss must have been treated as one for summary judgment under Fed.R.Civ.P. 12(b)(6). (cont'd.)

or in fact to find that once a motion for summary judgment has been denied that, after the facts and the positions of the parties are more clearly developed, summary judgment may not be granted. Moreover, we do not have such a situation here because there is no evidence that the trial court went outside the record when it ruled on the Fed.R.Civ.P. 12(b)(6) motion.[4]

And, because the Motion for Summary Judgment encompassed most of the same issues that had been set forth in the Motion to Dismiss, she argues that the issues raised in the summary judgment motion have already been ruled upon and may not be reconsidered.

[4]A reading of the district court's December 16, 1980, denial of the Motion to Dismiss shows that although the court noted that the defendants' motion was accompanied by several attachments, it stated:

> The Rule 12(b)(6) motion is aimed only at whether a claim has been adequately stated in the complaint, and the court's inquiry is limited to the content of the complaint. (Emphasis added.)

Further noting that a complaint should not be dismissed unless it appeared to a cer-
(cont'd.)

IV.

Finally, Mrs. Humphrey contends that the trial court, in finding that the 1979 state court judgment operated as a bar to the present suit against the Feazels, incorrectly utilized federal rather than Louisiana state law principles of res

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tainty that no relief could be granted under any set of facts that could be proved in support of its allegations, the court dismissed only the claim regarding removal of the trailer while denying the motion with respect to all other claims.

Furthermore, in its summary judgment order of July 9, 1982, the court, in response to the identical argument raised in this issue, noted that it had specifically treated the then-pending motion as one for dismissal for failure to state a claim. In so doing, the court pointed out that:

> (w)hile it was noted that the defendants' dismissal motion was accompanied by attachments, the ruling did not identify the attachments or discuss them in any way, nor were they considered in reaching a decision. The motion, therefore, was treated correctly as one for dismissal and the issues can properly be raised in a motion for summary judgment.

It is thus clear that in denying the de-
(cont'd.)

judicata. Mrs. Humphrey is correct in her assertion,[5] but this error is harmless in view of our finding that the facts litigated in the state case do not here state a federal claim and that the claims now made were properly the subject of summary judgment for the reasons stated in Part II C.

For the reasons set forth above, the district court's grant of summary judgment is affirmed.

A F F I R M E D.

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fendants' Motion to Dismiss, the trial court did not consider matters outside of the pleadings.

[5]In the wake of the Supreme Court's holding in Allen v. McCurry, 449 U.S. 90, 91, 101 S.Ct. 411, 418 (1980), that a res judicata defense is available in a subsequent 1983 action, decisions of this court have held that when a federal court is asked to give res judicata effect to a state court judgment, the federal court must apply the res judicata principles of the law of the state whose decision is set up as a bar to further litigation. (cont'd.)

Hernandez v. City of Lafayette, Number 82-3350, slip op. at 2880 (5th Cir. 1983); Southern Jam, Inc. v. Robinson, 675 F.2d 94, 97-98 (5th Cir. 1982); E. D. Systems Corp. v. Southwestern Bell Telephone Co., 674 F.2d 453, 457 (5th Cir. 1982). The district court was thus required to apply Louisiana rather than federal principles of res judicata to the instant case. In view of our reasoning, infra, we do not find it necessary to determine what, if any, difference the application of Louisiana, as opposed to federal, principles of res judicata would make.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

EFFIE R. HUMPHREY

versus CIVIL ACTION NO. 80-0241

CITY OF SHREVEPORT, et al

MEMORANDUM RULING

This is a civil rights action, alleging violations of 42 U.S.C. 1983 and 1985. The defendants are the City of Shreveport; Don Graham, a city employee; and R. C. Feazel and his wife, Jackie Kelly Feazel, neighbors of the plaintiff. Originally, the plaintiff alleged that she was being denied equal protection because the city refused to supply her with water and refused to move her trailer away from the new road built after expropriation of her property. Her claim against the Feazels

alleges that she has been subjected to harassment by them and others at their behest. A motion to dismiss was granted with respect to her claim based on the city's refusal to move her trailer. The defendants have filed a motion for summary judgment on the remaining issues. The plaintiff contends that because extraneous materials were submitted by all parties with respect to the motion to dismiss and because this court did not exclude the materials, that motion must have been treated as one for summary judgment under F.R.C.P. 12(b)(6). Based on this court's denial of the Rule 12(b) motion, the plaintiff argues that the issues now raised in the summary judgment motion already have been ruled upon and may not be reconsidered. Plaintiff is in error. In the memorandum ruling issued on December 17, 1980, this court specifically treated the then pending motion as one for dismissal for failure to

state a claim. While it was noted that the defendants' dismissal motion was accompanied by attachments, the ruling did not identify the attachments or discuss them in any way, nor were they considered in reaching a decision. The motion, therefore, was treated correctly as one for dismissal and the issues can properly be raised in a motion for summary judgment.

The plaintiff argues that she is being denied equal protection on the basis of her "age, sex, marital status and position in the community". There is no indication of how these characteristics have anything to do with the city's refusal to provide her with water. The evidence submitted by the defendants in support of their motion indicates that the plaintiff has been refused water service because she has a delinquent account as well as because of alleged zoning restrictions brought about by the presence of two structures on a R-1 lot. According to the affidavits submitted by the defend-

ants, the plaintiff owes $13.95 for past service and $20.00 as a deposit and has refused to pay. The defendants submit, therefore, that a legitimate non-discriminatory reason exists for the denial. The plaintiff responds by arguing that the status of her account with the water department is a defense which is properly considered on the merits of the case, not on a motion to dismiss. The plaintiff is overlooking the fact that the defendants' motion is one for summary judgment, not for dismissal. A party is entitled to summary judgment when he demonstrates that there is no actual dispute as to a material fact and that he is entitled to judgment as a matter of law. F.R.C.P. 56(c). The non-moving party does not have to respond unless and until the moving party has presented sufficient evidence to support the motion. At that point, the non-movant "must then come forward with specific offers of evi-

dence to present a material factual dispute." *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981).

The plaintiff herein has not responded to the claim that her water supply is denied for a legitimate reason. Rather, she complains that the denial is based on the city's erroneous position with respect to the application of certain zoning ordinances. She wants water supplied to two structures located on her lot which is zoned R-1 for single-family residences. According to the evidence submitted by the defendants, that is allowed only when a lot has been subdivided. The evidence also shows that on several occasions the plaintiff was told of the procedure for having the lot subdivided. None of this evidence is addressed by the plaintiff. She continues to rely on vague and conclusory allegations of discrimination on the basis of her age, sex, marital status and position in the community,

with absolutely nothing offered as a foundation for the claims. "General conclusionary allegations unsupported by facts are insufficient to constitute a cause of action." *Jewell v. City of Covington*, 425 F.2d 459, 460 (5th Cir. 1970). The plaintiff certainly has not "come forward with specific offers of evidence to present a factual dispute." *Environmental Defense Fund, supra.* The defendants are entitled to summary judgment on plaintiff's claim against the City of Shreveport and Don Graham based on the denial of water service.

The complaint also alleges that defendants R. C. Feazel and Jackie Feazel have violated the plaintiff's civil rights through various actions. The claim directed towards Jackie Feazel's alleged involvement in the denial of water services is disposed of by virtue of this court's finding that the city defendants have proven legitimate reasons for the denial. With respect to

the other alleged violations directed against the Feazels, this court finds that those claims are barred under principles of *res judicata*. Initially, it is important to note that federal, not state, principles apply. The plaintiff relies on state principles, which are much narrower than those under common law. However, in *Angel v. Bullington*, 67 S.Ct. 657, 662 (1947), the court stated that "where resort is had to a federal court not on grounds of diversity of citizenship but because a federal right is claimed, the limitations upon the courts of a State do not control a federal court sitting in the State." *See also Aerojet-General Corporation v. Askew*, 511 F.2d 710, 716 (5th Cir. 1975). This case arises under the civil rights statute, therefore, this court is not bound by state rules regarding *res judicata*.

The claims against the Feazels center around an alleged "slanderous petition"

circulated by them which resulted in the civil commitment of the plaintiff to the custody of the coroner. The plaintiff also alleges that the "false reports" made to various public officials, along with the commitment, caused her to be branded as a "nut", and that as a result of that her claims to city officials are never taken seriously. There are further complaints about regularly occurring harassment of the plaintiff by the Feazels. The claims arising from the commitment petition have been the subject of a prior lawsuit. In *Humphrey v. Feazel*, 367 So.3d 897 (La. App. 1979), *writ denied* April 23, 1979, the court denied plaintiff's claims of libel and false imprisonment, finding that the allegations contained in the petition for commitment were substantially true. That ruling bars any consideration by this court of the claims related to the petition. Furthermore,

under the principles of *res judciata*, "a judgment in a prior suit between the same parties bars a suit on the same cause of action not only as to all matters offered at the first proceeding, but also as to all issues that could have been litigated." *Johnson v. U.S.*, 576 F.2d 606, 611 (5th Cir. 1978). The issues that could have been litigated in the prior suit encompass the claims of harassment and of being labeled a "nut", therefore, this suit, as it pertains to the Feazels, is barred under *res judicata*. In reaching that conclusion, this court is mindful of the care with which *res judicata* should be applied. "[T]he court must be satisfied not only that the party against whom estoppel is urged has had a full and fair opportunity to litigate the issue in the prior proceeding but also that the application of the doctrine, under the circumstances, will not result in injustice to the party . . .

Moreover the court must be satisifed that the application of res judicata or collateral estoppel does not contravene any overriding public interest." (Citations omitted.) *Id.* at 614. Considering all of those factors, this court is convinced that *res judicata* properly applies to the plaintiff's claims.

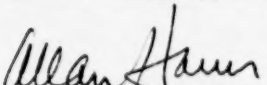
As noted earlier, the plaintiff's only response to defendant's plea of *res judicata* is that *res judicata* under Louisiana law is so limited that it does not apply here. Having found that Louisiana law does not control, this court concludes that no genuine issues of material fact remain with respect to the allegations against the Feazels, and the defendants are entitled to judgment as a matter of law.

Defendants' motion for summary judgment is GRANTED.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 9th day of July, 1982.

TOM STAGG
UNITED STATES DISTRICT JUDGE

COUNSEL OF RECORD



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